IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 1, 2001 Session

JULIUS HILL v. PERRIGO OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
No. 41239 Robert E. Corlew, Judge

No. M2000-02452-COA-R3-CV - Filed June 21, 2001

This is an appeal from a grant of summary judgment to defendant, former employer of plaintiff. The plaintiff claims that he was fired in violation of the whistleblower statute, Tenn. Code Ann. § 50-1-304. The trial court found that the plaintiff failed to establish the *prima facie* elements under the statute, specifically, that the reason for his firing was solely because of his alleged reports of illegal activities. For the reasons below, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., and WILLIAM B. CAIN, JJ., joined.

James L. Harris, Nashville, Tennessee, for the appellant, Julius Hill.

Robert E. Boston, Brian A. Lapps, Jr., Nashville, Tennessee, for the appellee, Perrigo of Tennessee.

OPINION

Plaintiff, Julius Hill, had been employed by the defendant, Perrigo of Tennessee, and its predecessor in interest, Cumberland Swan since 1988. He was employed as a chemist in the Quality Control ("QC") laboratory. Primarily, his job consisted of conducting quality control tests on various over the counter health and beauty aids produced by the company, including mouthwash, medicated chest rub and laxatives, to ensure that they met the applicable quality standards. Since his hiring, he had been employed on the third shift, the night shift.

In July 1990, he was promoted to the position of lead chemist. He claims that he reported to various supervisors violations or problems he saw with testing results or procedures in 1993, 1994, 1995 and 1998 including tests not being performed properly, test results being falsified and employees sleeping in the lab. These reports are the basis of his claim to be a whistleblower. Mr. Hill also claims that he was told on several occasions over a period of time by supervisors Jimmy

Purdom and Tom Smith that he was "bucking management" and if he "didn't get rid of his attitude," he would be fired.

Mr. Hill had difficulties at work, and on August 14, 1998, was counseled for his poor work-related attitude and lack of professionalism in dealing with others as part of his employer's progressive discipline policy. In response, he prepared a memorandum of the events which stated in pertinent part:

> I agreed to responding in a negative manner to unprofessional stimuli introduced into my work environment, by . . . Supervisor Beasley and individuals under his authority.
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> At least I'm professional enough to agree, I responded in a unprofessional manner. I also was most willing to sign the probationary disciplineJ [sic] form, to acknowledge the occurrence of my response.
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> Discipline is in order! It seem like it was in order of counseling probation for me which was acknowledged and accepted.

Later on, in October 1998, Mr. Hill mislabeled relevant paperwork on testing of medicated chest rub. Specifically, he did not note that he had used an analytical column different from that called for by the standard operating procedures. In response to these accusations, Mr. Hill sent the following e-mail to his supervisor, Jimmy Purdom, despite being instructed to display a professional attitude a few months prior: "In case you don't know, I'll tell I know, kConnie [sic] was involved up to her sorry back stabbing neck."

Mr. Hill was given a final warning and placed on indefinite probation after these documentation errors and unprofessional e-mails since the last counseling. The letter in the personnel file stated:

> The recent incident involving Medicated Chest Rub analysis/documentation (lot 8K1212), taken together with past incidences as evidenced by counseling step of Progressive Disciplinary Policy document dated 8/14/98 and other memos, has led to the decision of indefinite probation for employee Julius Hill.
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> As discussed with Julius, the main problem is that he did not document that he had utilized a different procedure than the designated method. This is not the performance expected from an employee in a Lead Chemist position.
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> The recorded Progressive Disciplinary Policy counseling of 8/14/98 dealt with the employee being missing from the lab and exhibiting unprofessional behavior to others. The e-mail sent to Jimmy Purdom after a 12/3/98 discussion with Mr. Hill about the Medicated Chest Rub testing also exhibits unprofessional behavior (e-mail re: Connie Gann). This behavior cannot continue.

The stipulations of this probation are as follows:

1. Employee will conduct himself in a professional manner.
2. Employee will receive communication from previous shift and provide communication to the shift following him as it relates to product sample status in the lab, so that efficient operations will result.
3. Employee will properly document any and all testing he performs. This must include a clear explanation for any deviations from the method(s) referenced for sample testing, as is stipulated in cGMP [sic] requirements.
4. Employee will keep the Supervisor and/or Manager informed of any situations that occur with other departments that impede efficient operations.

Should any violation of the above occur, further immediate disciplinary action up to and including termination will result.

Yet, the day after the warning set out above and then three weeks later, Mr. Hill erroneously approved ethyl rubbing alcohol for packaging. Subsequent tests by other chemists revealed the alcohol level was too low. The employer had to have the packages retumed from the customer's warehouse and reject the packaged product and remix the portion not yet packaged at employer's time and expense. Mr. Hill was then terminated effective January 20, 1999 for "failure to follow procedure and past performance issues."

Mr. Hill then initiated this lawsuit for violation of the Tennessee Whistleblower Act, Tenn. Code Ann. § 50-1-304. The trial court granted summary judgment in favor of the employer on the basis Mr. Hill failed to establish that his reporting of alleged irregularities in testing and labeling was the sole or exclusive cause of his dismissal. Mr. Hill appeals the trial court's grant of employer's summary judgment on the grounds that he did prove the *prima facie* elements of his case and that any reasons advanced by the employer were merely pretextual. For the reasons below, we affirm the summary judgment.

I.

Because this is an appeal from a grant of a motion for summary judgment, our standard of review is *de novo* with no presumption of correctness. *City of Tullahoma v. Bedford County,* 938 S.W.2d 408, 412 (Tenn. 1997); *McClung v. Delta Square Ltd. P'ship,* 937 S.W.2d 891, 894 (Tenn. 1996). Using this standard of review, we make a fresh determination concerning whether the movant has met the requirements of Tenn. R. Civ. P. 56. *Hunter v. Brown,* 955 S.W.2d 49, 50-51 (Tenn. 1997); *Mason v. Seaton,* 942 S.W.2d 470, 472 (Tenn. 1997). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material facts and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms,* 900 S.W.2d 23, 26 (Tenn. 1995); *Byrd v. Hall,* 847 S.W.2d 208, 214 (Tenn. 1993).

We must view the evidence in the light most favorable to Mr. Hill and must also draw all reasonable inferences in his favor. *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997); *Mike v. Po Group, Inc.*, 937 S.W.2d 790, 792 (Tenn. 1996). Thus, a summary judgment should be granted only when the undisputed facts reasonably support one conclusion - that Perrigo is entitled to a judgment as a matter of law. *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d at 26.

II.

A defendant may demonstrate entitlement to judgment as a matter of law by showing that the plaintiff cannot establish an essential element of his or her claim. *Byrd v. Hall*, 847 S.W.2d at 213, *Brenner v. Textron Aerostructures*, 874 S.W.2d 579, 584 (Tenn. Ct. App. 1993). Mr. Hill's claim is allegedly a violation of Tenn. Code Ann. § 50-1-304 which provides in pertinent part:

> (a) No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities. . . .
> (c) As used in this section, "illegal activities" means activities which are in violation of the criminal or civil code of this state or the United States or any regulation intended to protect the public health, safety or welfare.
> (d1) Any employee terminated in violation of subsection (a) shall have a cause of action against the employer for retaliatory discharge and any other damages to which the employee may be entitled.

The four elements of a *prima facie* case under Tenn. Code Ann. § 50-1-304 are:

> (1) The plaintiff's status as an employee of the defendant;
> (2) The plaintiff's refusal to participate in, or to remain silent about, illegal activities;
> (3) The employer's discharge of the employee; and
> (4) An exclusive casual relationship between the plaintiff's refusal to participate in or remain silent about illegal activities and the employer's termination of the employee.

Spivey v. Sumner County, No. M2000-00771-COA-R3-CV, 2001 WL 459097 at *3 (Tenn. Ct. App. May 2, 2001); *Darnall v. A+ Homecare, Inc.*, No. 01-A-01-9807-CV-0034, 1999 WL 346225 at *5 (Tenn. Ct. App. Jun. 2, 1999) (no Tenn. R. App. P. 11 application filed); *Hubrig v. Lockheed Martin Energy Sys., Ins.*, No. 03A01-9711-CV-00525, 1998 WL 240128 at *7 (Tenn. Ct. App. May 4, 1998) (perm. app. denied Oct. 12, 1998). *See also Griggs v. Coca-Cola Employees' Credit Union*, 909 F. Supp. 1059, 1063 (E.D. Tenn. 1995).

The trial court granted summary judgment in this case on the grounds that

> [a]s the Court understands the law, the Plaintiff initially has the burden of coming forward showing that he was so terminated in violation of the statute. When that is done, the burden shifts to the employer to advance a non-discriminatory reason for the termination, and the burden again then shifts to the Plaintiff to show that his termination was solely for the reasons which he initially alleged. . . . The employer has now come forward with evidence showing that the Plaintiff was counseled and placed on probation because of alleged attitude problems. While the plaintiff denied the probation was justified, he does acknowledge that he was placed on probation, and that he made statements essentially asserting that his supervisor was untruthful. While on probation, the Plaintiff further does not dispute that on two occasions within three weeks he improperly tested two batches of alcohol, one of which was further processed, at least in part, and delivered to a purchaser or purchasers and was then withdrawn by the employer at some cost. The Plaintiff has then come forward again with evidence that it is his opinion that although he does not deny these other circumstances, the improper testing of the substance occurred without his fault and was a mere pretext.
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> After considering all the evidence, the Court must consider that the plaintiff's termination had to have occurred at least in part due to the reasons advanced by the employer. The Plaintiff asserts a number of incidents where he complained because the acts which he asserts (and for purposes of this motion the Court considers) to be illegal, going back a short number of years, and as recently as a few months prior to his termination. The Plaintiff's termination, however, occurred immediately after the last of the incidents alleged by the employer, and the last two incidents alleged by the employer occurred after the last incident which the employee alleges.
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> While the circumstances cited by the employer may have been a factor in the Plaintiff's termination, it appears, as a matter of law, that the Plaintiff cannot carry the burden of showing that the reasons he advances were the exclusive reasons for his termination. Given the very stringent burden which the statute places upon one seeking relief under the provisions of the "Whistle Blower" statue, the Court must find that the complaint must be dismissed at the cost of the Plaintiff.

We agree. It is now well-settled that an essential element of a claim under the whistleblower statute, Tenn. Code Ann. § 50-1-304, is a showing that the alleged "whistleblowing" was the sole cause of the termination. *See Darnall v. A+ Homecare, Inc.*, 1999 WL 459097 (discussing history of sole cause requirement). As this court has observed:

> [p]rior to the passage of T.C.A. § 50-1-304, the appellate courts had not clearly settled on whether a plaintiff was required to show that protected activity was either a substantial factor or the sole cause of termination. But the statute supplied the answer; it clearly requires the employee to show that the *sole* cause of his termination was his refusal to remain silent about illegal activities in the workplace.

Hubrig, 1998 WL 240128 at *11 (emphasis in the original).

Courts have recognized "that the plaintiff has indeed a formidable burden in establishing elements number two and four of the cause of action."[1] *Darnall*, 1999 WL 346225 at *5 (citing *Griggs*, 909 F. Supp. at 1063; *Merryman v. Central Parking Sys. Inc.*, No. 01A01-9203-CH-00076, 1992 WL 330404 (Tenn. Ct. App. Nov. 13, 1992) and *Leeman v. Edwards*, No. 01A01-9401-CV-00050, 1994 WL 560889 (Tenn. Ct. App. Oct. 14, 1994) (both overruled on other grounds)). In *Darnall*, this court acknowledged that the employee's actions in questioning and discussing with outside auditors his employer's accounting practices "may have been the main reason for his discharge and probably were at least a substantial part of the reason." 1999 WL 346225 at *5. However, because the employer provided substantial evidence to establish a casual relationship between the dismissal and other conduct by the employee, the employee was unable to establish the necessary exclusive or sole causation element. *Id*. at *7. *See also Spivey*, 2001 WL 459097 at *4 (employer articulated legitimate performance-related reasons for termination and employees could not establish their alleged "whistleblowing" was the sole cause of dismissal).

In fact, most cases addressing this issue are appeals from summary judgment for the employer which have been affirmed on the grounds that the employee is unable to surmount the burden of proving the refusal to remain silent about illegal activities in the workplace was the "sole" reason for termination. *See Griggs*, 909 F. Supp. at 1065-66; *Spivey*, 2001 WL 459097 at *5; *Darnall*, 1999 WL 346225 at *5, 7; *Hubrig*, 1998 WL 240128 at *10, 11.

In the case before us, we reach the same conclusion. The employee, Mr. Hill, was unable to show that the sole reason for his discharge was his refusal to remain silent about illegal activities at Perrigo. He had made complaints, which for purposes of the motion we must assume related to "illegal activities," over the course of many years without being terminated. More than five years after the employee's first complaint and only after there were documented attitude problems, work performance problems, and progressive disciplinary steps taken, was he fired. These facts are not disputed. In fact, the employee admitted to sending the derogatory e-mail about his supervisor and having a confrontation with another co-employee. Moreover, the employee admitted in his deposition that the problems with the inaccurate test results probably played a role in the employer's decision to fire him.

The employer has documented various performance-related problems, including placing Mr. Hill on probation, which would warrant his termination. The employer has demonstrated the casual relationship, particularly through the timing of various events, between his performance problems and his dismissal. Thus, there were reasons other than, or in addition to, the employee's complaints

[1]Generally, Tennessee is an employment at will state, meaning that an employee or employer is free to terminate the employment for good cause, bad cause or no cause at any time under an indefinite term employment contract. *Combs v. Standard Oil Co.*, 166 Tenn. 88, 59 S.W.2d 525 (1933); *Randolph v. Dominion Bank*, 826 S.W.2d 477, 478 (Tenn. Ct. App. 1991). However, Tenn. Code Ann. § 50-1-304 is one example of a narrowly carved exception to this general rule.

of "illegal activity" for his termination. Summary judgment is affirmed because the employee was not able to meet the stringent standard of showing that the *sole* reason for his termination was his complaints of "illegal activities."

III.

Where, as here, an employer moves for summary judgment on the basis of other causes for dismissal, with supporting documentation, the burden shifts to the employee. When faced with his employer's motion for summary judgment, Mr. Hill had the burden of producing evidence which contradicted the allegations asserted by Perrigo in its motion. *Byrd*, 847 S.W.2d at 215. Mr. Hill was required to set forth specific facts, not legal conclusions, by using affidavits or discovery materials that establish there are disputed issues that are material to the resolution of the case. *Id.* A disputed fact is material for summary judgment purposes if it must be decided in order to resolve a substantive claim or defense underlying the summary judgment motion. *Id.*

Mr. Hill asserts that even though the employer has provided a reason for his termination other than "whistleblowing," such reasons were pretextual. Mr. Hill does not dispute that the confrontation with the co-employee occurred or that he sent the derogatory e-mail or that the tests were inadequately or incorrectly performed. Instead, he asserts that the employer was "setting him up to fail" and, therefore, the reasons supplied by the employer are merely pretextual for the real reason of his termination.

The shifting burden of proof in the area of employment law is well established in Tennessee:

> Even if a plaintiff is able to muster sufficient direct or circumstantial evidence to allow the inference of a causal link between the [protected conduct] and the plaintiff's subsequent discharge, that does not end the inquiry. The burden is shifted to the employer to come forward with a "legitimate, non-pretextual reason for the employee's discharge."
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> Where the employer presents a legitimate, non-discriminatory reason for the employment action, the burden shifts back to the employee to prove that the employer's explanation is pretextual or not worthy of belief. In doing so, the employee "must present specific admissible facts, which realistically challenge the defendant's stated reasons." The employee faces summary dismissal of his claims if he is unable to demonstrate that he could prove that the defendant's reason for the discharge was pretextual. Thus, if the employee fails to make the required showing of pretext, the employer must prevail.

Robinson v. Nissan Motor Mfg. Corp., No. M1999-00296-COA-R3-CV, 2000 WL 320677 at *5-6 (Tenn. Ct. App. Mar. 26, 2000) (no Tenn. R. App. P. 11 application filed) (citations omitted).

When the burden shifts to the employee to show pretext, he must show the reason advanced by the employer is "a phony reason for some action." *Hubrig*, 1998 WL 240128 at * 8 (quoting *Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995)). Moreover, this showing must consist of more than conclusory statements by the employee. *Id*. The subjective interpretation by the employee of the actions of the employer will not create an issue of fact to defeat summary judgment. *Id*.

To support his claim of pretext, Mr. Hill was required to provide specific facts realistically challenging his employer's documented reasons for discharging him. This task is made especially difficult in this case because of the employer's records indicating progressive stages of discipline, including putting Mr. Hill on probation prior to the last problems which resulted in his discharge. Mr. Hill's claims that he was "set up to fail" are mere conclusory allegations he has failed to support with specific factual allegations.

There is no evidence in the record, other than employee's conclusory allegations, that the employer's actions and reasons were pretextual. Moreover, because the employee admits to his own unprofessional behavior, the employer's reason for termination is not "phony." As for the test results, employee claims that he was being set-up to fail and, while admitting the results were incorrect, he claims it was not his fault because the instruments were faulty. However, there is nothing more than employee's conclusory allegations to this effect in the record. There is no evidence in the record that the equipment was faulty or tampered with by the employer or its employees. In fact, the employee does not dispute that there were no other problems by other employees using the equipment in the interim between the first incident in December and the second incident in January. Even the employee himself was able to properly test items in the interim without a problem. The proof does not show that the employer was aware of any problems with the equipment during this time period.

For these reasons, we find that the employer came forward with a legitimate, non-pretextual reason for the termination and Mr. Hill is unable to carry his burden of showing that such reasons are not worthy of belief, or are phony, by the allegation of admissible facts and not his own conclusory allegations. Thus, he has failed to create a genuine issue of material fact. The summary judgment is affirmed.

IV.

For the reasons stated herein, we affirm the trial court's grant of summary judgment and remand for any further actions as necessary. The costs of this appeal are taxed to the appellant, Julius Hill, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE